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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1971

IN THE INTEREST OF
THOMAS ANDREW SCHROUD, A JUVENILE:
BARBARA SCHROUD,

Petitioner,

vs.

MILWAUKEE COUNTY DEPARTMENT
OF PUBLIC WELFARE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WISCONSIN

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Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Wisconsin entered on February 1, 1972.

OPINION BELOW

The opinion of the Supreme Court of the State of Wisconsin is reported at 53 Wis. 2d 650, 193 N.W. 2d 671 and is set out in the appendix, pp. 1-6. The pertinent sections of the trial court opinion and the interim appellate court opinion are set out in the appendix, pp. 6-20.

JURISDICTION

Jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED FOR REVIEW

1. Have the constitutional rights of the petitioner to due process and equal protection of the law as guaranteed by the Fourteenth Amendment to the United States Constitution been violated because of the refusal to grant petitioner a hearing on a motion, timely filed under state procedure, and allow her an opportunity to present evidence that her consent to terminate her parental rights to her child was obtained by coercion and the result of duress worked upon her by agents of the respondent, Milwaukee County Department of Public Welfare.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Fourteenth Amendment to the United States Constitution.

2. This case involves Sec. 48.46 and Sec. 263.45 Wis. Stats.

STATEMENT OF THE CASE

On July 20, 1969 petitioner, Barbara Schroud, gave birth to Thomas Andrew Schroud at Columbia Hospital in Milwaukee, Wisconsin. At that time Barbara Schroud was unmarried and twenty (20) years of age, having been born on August 26, 1948. Prior to the birth of Thomas, agents of the Milwaukee County Department of Public Welfare had conferred with Barbara Schroud relative to the advisability and procedures involved in terminating her parental rights to the child. Initial contact by the Department of Public Welfare and Miss Schroud was had on

April 16, 1969 and the machinery to accomplish the termination of her parental rights was put in motion prior to the birth of the child. Formal application to the Children's Division of the County Court for Milwaukee County was filed on August 18, 1969. The final hearing to terminate the parental rights of Barbara Schroud to the child, Thomas Andrew Schroud, was held before the Children's Division of the County Court of Milwaukee County on September 23, 1969 at which time Barbara Schroud appeared on her own behalf and consented to the termination of her parental rights. At that hearing she was not represented by counsel nor by guardian ad litem.

On September 18, 1970 Barbara Schroud petitioned the Children's Division of the Milwaukee County Court for a rehearing directed to the termination of her parental rights to Thomas Andrew Schroud alleging in the petition:

A. That the proceedings to terminate her parental rights were initiated and application to the court made during her minority and therefore no guardian ad litem having been appointed pursuant to law to represent her interests, proceedings of termination were null and void and

B. The consent to the termination of parental rights made by Barbara Schroud at the hearing of September 23, 1969 was the result of undue influence exercised by the agents of the Department of Public Welfare for Milwaukee County over the petitioner and that therefore said consent was obtained under duress and it was not voluntary.

Upon the petition filed, the Children's Division of the County Court of Milwaukee County, the Honorable William Bowman presiding, ordered the Milwaukee County Department of Public Welfare to show cause on September 30, 1970 why a rehearing directed to the matters should not be had.

On September 30, 1970 the parties appeared by their respective counsel and after argument and consideration of the record of the hearing of September 23, 1969 the court held:

A. That the petitioner had not been entitled to the appointment of a guardian ad litem and the proceedings were therefore not void for failure to have counsel or guardian ad litem and

B. On the record of the proceedings the consent was voluntary.

Upon these holdings the court denied the petition for rehearing. (App. pp. 12-20).

An appeal was taken from that order denying the petition for rehearing, to the Circuit Court of Milwaukee County, Branch #15, the Honorable Marvin C. Holz, presiding. That court sustained the order of the lower court. (App. pp. 6-12).

On February 1, 1972, the Supreme Court of Wisconsin affirmed the judgment of the Circuit Court of Milwaukee County. (App. pp. 1-6).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE WISCONSIN SUPREME COURT VIOLATES THE FUNDAMENTAL RIGHT OF A LITIGANT TO A HEARING AS GUARANTEED UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is well established that fundamental due process as encompassed in the Fourteenth Amendment requires that a party to litigation be accorded an opportunity to be heard. A clear recitation of the applicable rules is found in the following abstract from Mr. Justice Harlan's majority opinion in *Boddie* v. *Connecticut* (1971) 401 U.S. 371, 28 L.Ed. 2d 113, 91 S.Ct. 780:

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that '(w)herever one is assailed in his person or his property, there he may defend.' Windsor v. McVeigh, 93 US 274, 277, 23 LEd 914, 915 (1876). See Baldwin v. Hale, 1 Wall 223, 17 LEd 531 (1864); Hovey v. Elliott, 167 US 409, 42 L. Ed 215, 17 S.Ct. 841 (1897). The theme that 'due process of law signifies a right to be heard in one's defence,' Hovey v. Elliott, supra, at 417, 42 L Ed at 221, has continually recurred in the years since Baldwin, Windsor, and Hovey. Although '(m)any controversies have raged about the cryptic and abstract words of the Due Process Clause,' as Mr. Justice Jackson wrote for the Court in Mullane v. Central Hanover Tr. Co., 339 US 306, 94 L Ed 865, 70 S Ct 652 (1950), 'there can be no doubt that at a minimum they require that depri-

vation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' Id., at 313, 94 L Ed at 873 . . .

"What the Constitution does require is 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' Armstrong v. Manzo, 380 US 545, 552, 14 L Ed 2d 62, 85 S Ct 1187 (1965) (emphasis added), 'for (a) hearing appropriate to the nature of the case,' Mullane v. Central Hanover Tr. Co., supra, at 313, 94 L Ed at 873. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. In short, 'within the limits of practicability,' id., at 318, 94 L Ed at 875, a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause."

The applicable principles encompassed in the due process and equal protection clauses of the Fourteenth Amendment have recently been applied in analogous cases deciding the rights of unwed fathers vis a vis unwed mothers and illegitimate children. See *Stanley* v. *Illinois* (decided April 3, 1972), 40 L.W. 4371, and *Rothstein* v. *Lutheran Social Services of Wisconsin* (decided April 17, 1972).

Here, it is of note that the position of the trial court in *Rothstein* was identical to that of the trial court in the case at bar. The opinion of the Wisconsin Supreme Court

in *Rothstein* sub nom *State ex rel Lewis* v. *Lutheran Social Services* (1970), 47 Wis.2d 420, 178 N.W.2d 56, recites:

> "... the court held a hearing on this petition, *but refused to receive any evidence concerning petitioner's fitness* to have custody of the child." (Emphasis supplied) 47 Wis.2d 422-423

In the case at bar, the trial court held a hearing in the petition *but refused to receive any evidence concerning the coercion practiced upon the petitioner.* The key to the constitutional violation rests with the refusal to afford the parties this opportunity to present evidence—the "meaningful opportunity to be heard within the limits of practicability" spoken of in *Boddie* supra.

The Wisconsin Supreme Court declined to respond directly to this critical issue although it appeared to clearly apprehend the problem[1] and the issue was briefed and submitted in constitutional terms.[2] The court does not resolve the issue in constitutional terms, however, but rather decides the merits of the case on the false premise of insufficiency of the pleadings.[3] This despite the fact that no attack on the pleadings had been made by the respondent in the trial court and the decision of the trial court was

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[1] "Right to a hearing on newly discovered evidence.

"Appellant next argues that the trial court should have granted a rehearing in order that she could present evidence of coercion and undue influence which allegedly would show that her consent for the termination of parental rights was not voluntary." App. p. 3.

[2] App. pp. 20-22.

[3] Citing as authority an 1860 decision which involved *NO* claim of constitutional deprivation and *NO* issue of coercion. *Dunbar* v. *Hollinshead* (1860), 10 Wis. 447 (*505).

NOT based *IN ANY WAY* upon pleading insufficiency.[4] Had such an objection been tendered, Wisconsin procedure allowed amendment of the pleading and submission of additional affidavits AS A MATTER OF RIGHT.[5]

The concluding paragraph of the opinion classifies the refusal to afford the petitioner an opportunity to present evidence as a discretionary ruling reversible only when abuse is apparent.[6] It is respectfully submitted that the right to a fair hearing is a subject of constitutional due process and equal protection—not a subject of abuse of discretion.

Finally in the conclusion of its opinion the Wisconsin Supreme Court makes findings of fact as to the voluntariness of the petitioner's consent. This again clearly was not an issue involved in the case at any stage since the trial court had denied the petitioner an opportunity to present *ANY* evidence directed to the issue. The illogic employed is reminiscent of that adopted by the State of Wisconsin in attempting to sustain the constitutional deprivation in *Groppi* v. *Wisconsin* (1971), 400 US 505, 27 LEd 2d 571, 91 S.Ct. 490.[7] As in *Groppi* the position of Wisconsin was that the litigant had not been denied a hearing because he was not entitled to a hearing. Understandably,

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[4] App. pp. 12-20.

[5] See Chapter 263 Wis. Stats., particularly Sec. 263.45.

[6] App. p. 6.

[7] A subsequent case involving *Groppi* also was reversed because of the failure to afford a hearing. See *Groppi* v. *Leslie* (1972), 30 L.Ed. 2d 632, 92 S.Ct. 582.

the argument did not prevail. By such tautalogous reasoning any hearing or opportunity to be heard could be denied in any case. Of course, the facts will support a finding of voluntariness where a petitioner is denied the opportunity to present evidence of coercion of duress. It is fundamental Fourteenth Amendment due process that an essential attribute of a fair hearing is to afford to *both* parties an opportunity to present evidence. Where opportunity is given to only one litigant, any resulting finding of fact is inherently unreliable.

To sanction the decision as announced by the Wisconsin Supreme Court is to effectively deny legal recourse to mothers whose consent to terminate parental rights was obtained by coercion or under duress.

CONCLUSION

For the reasons stated above, certiorari should be granted, and the decision of the Wisconsin Supreme Court reversed per curiam.

Respectfully submitted,

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